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Chapter 12: Ethics

Barry Brown

CHAPTER 12

Ethics

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§ 12.1. Introduction. Although considerable attention in 1982 was given by the bar to the debate over the Proposed Model Rules of Professional Conduct[1] as promulgated by the Kutak Committee of the American Bar Association, the Supreme Judicial Court considered and decided several cases of importance involving issues of professional conduct under the presently adopted Code of Professional Responsibility in Massachusetts.[2] Specifically, the Court considered problems arising in the areas of conflict of interest,[3] prosecutorial misconduct in the course of final argument before a jury[4] and reinstatement of a disbarred lawyer.[5] Although the cases noted and described in this chapter are not exhaustive of all of the decisions of the Court or the Board of Bar Overseers in 1982, they nevertheless represent significant opinions in areas of broad concern regarding attorney conduct and discipline.

§ 12.2. Reinstatement. As recently as ten years ago, it was possible to conclude after a review of the case law in Massachusetts that the decisions of the Supreme Judicial Court fell squarely within the majority of jurisdictions which rarely permitted the reinstatement of disbarred attorneys.[1] Although there had been some inconsistency, particularly in this century, in the manner in which the courts of the Commonwealth dealt with the discipline of attorneys, instances of reinstatement appear to have largely resulted from the bifurcation of jurisdictional authority between

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§ 12.1. [1] MODEL RULES OF PROFESSIONAL CONDUCT (1981).

[2] MASS. SUP. JUD. CT. R. 3:07, 3:08, 4:01 *et seq.*

[3] McCourt Company, Inc. v. FPC Properties, Inc., 386 Mass. 145, 434 N.E.2d 1234 (1982).

[4] Commonwealth v. Hoppin, 387 Mass. 25, 438 N.E.2d 820 (1982).

[5] Matter of Gordon, 385 Mass. 48, 429 N.E.2d 1150 (1982).

§ 12.2. [1] *See* Matter of Keenan, 314 Mass. 544, 50 N.E.2d 745 (1943), and related cases, 313 Mass. 186, 47 N.E.2d 12 (1943), 310 Mass. 166, 37 N.E.2d 516 (1942), 287 Mass. 577, 192 N.E. 65 (1934); Berman v. Coakley, 243 Mass. 348, 137 N.E. 667 (1923); Boston Bar Association v. Greenhood, 168 Mass. 169, 46 N.E. 568 (1897).

the trial courts and the Supreme Judicial Court.[2] Until the 1975 decision in the *Matter of Alger Hiss*,[3] it was fair to say that the Supreme Judicial Court adhered to the strict view of the American Bar Association as expressed by the long-time Chairman of its Ethics Committee, Henry Drinker:

> While it is . . . always possible that a disbarred lawyer may be reinstated, this, it is believed, should almost never occur except where the court concludes that the disbarment was erroneous. For a lawyer who has been found guilty of an act warranting disbarment to be reinstated justly creates an impression on the public which is very bad for the reputation of the Bar, the conclusion being that this is because of friendship, pity or political influence; which is not infrequently the case.[4]

Although Massachusetts, unlike some other jurisdictions, has never imposed an absolute bar against the reinstatement of convicted felons,[5] the Supreme Judicial Court has rarely in recent history readmitted an individual, particularly where disbarment has occurred as a result of the commission of a serious crime.[6] In fact, prior to the readmission of Alger Hiss by the Court in 1975, two decisions of the Court, *Matter of Keenan*[7] and *Matter of Centracchio*,[8] appeared to impose an almost impossible burden upon an applicant for readmission to the Massachusetts Bar. During the *Survey* year in *Matter of Gordon*[9] the Supreme Judicial Court once again considered a petition for reinstatement from an individual who had been disbarred after being convicted of a crime. The Court in *Gordon* concluded that it could not grant reinstatement. It is both useful and necessary to examine the *Keenan* and *Centracchio* decisions as well as the Court's opinion in the *Hiss* case in order to gain a perspective for analyzing the recent *Gordon* decision.

In the first of these cases, Wilfred Keenan was disbarred as a result of

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[2] *See* Matter of Keenan, 310 Mass. 166, 37 N.E.2d 516 (1942). There have been instances of reinstatement after disbarment for serious crimes in Massachusetts but these mostly occurred because the disciplinary function was divided between the Supreme Judicial Court and the superior court. *See* Boston Bar Association v. Greenhood, 168 Mass. 169, 46 N.E. 568 (1897); Boston Bar Association v. Greenhood, No. 12421 (Suffolk Super. Ct. 1902) (petitioner readmitted); In re Runyon, No. 89806 (Suffolk Super. Ct. 1904) (attorney disbarred for attempted bribe of grand juror; readmitted thirteen years later); In re Casey, No. 311074 (Suffolk Super. Ct. 1938) (attorney disbarred for bribing juror; reinstated three years later).

[3] 368 Mass. 447, 333 N.E.2d 429 (1975).

[4] H. DRINKER, LEGAL ETHICS (2d ed. 1953).

[5] *See, e.g.*, N.Y. JUD. LAW § 90(5) (McKinney 1968); TENN. CODE ANN. § 29-310 (1955 and Supp. 1974).

[6] *See supra* note 2.

[7] 314 Mass. 544, 50 N.E.2d 785 (1943).

[8] 345 Mass. 342, 187 N.E.2d 383 (1963).

[9] 385 Mass. 48, 429 N.E.2d 1150 (1982).

an investigation into public complaints of widespread corruption among members of the trial bar in Massachusetts.[10] The complaints turned out to be justified and Keenan was found to be among those who had engaged in the bribery of jurors. Five years after his disbarment, Keenan petitioned for reinstatement. More then sixty lawyers, judges and friends testified to his excellent moral character and to the highly ethical nature of his subsequent activities. Nevertheless, the Supreme Judicial Court denied reinstatement because, in its view, Keenan had made an insufficient showing that he would not victimize people again in a manner that had resulted in his disbarment. The Court held that there was insufficient assurance after the passage of the five year period that if the petitioner were allowed to exchange the obligations and standards of the marketplace for those of the Bar he would not again fall victim to the same weakness that was his first undoing.[11] The Court concluded that Keenan's conviction and subsequent disbarment were conclusive evidence of his lack of moral character at the time of his removal from office,[12] and consequently "little less than absolute assurance of a complete change of moral character"[13] and a "guarantee against [the conduct's] repetition" had to be shown before a petitioner met the burden for allowing reinstatement.[14]

The Court in *Keenan* recognized that one convicted of jury tampering or perjury had committed a direct attack upon the foundations of the judicial system and that public opinion would neither readily accept nor condone the return of that individual to a position of official trust.[15] The Court rejected the notion that the question in a reinstatement case was whether the disbarred attorney had been punished enough. Such a test would emphasize the attorney's private interest over more important public interests. According to the Court, any balancing of values in this area would always have to be resolved in favor of the public welfare.[16]

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[10] *See* Matter of Keenan, 314 Mass. 544, 50 N.E.2d 785 (1943), and related cases, 313 Mass. 186, 47 N.E.2d 12 (1943), 310 Mass. 166, 37 N.E.2d 516 (1942), 287 Mass. 577, 192 N.E. 65 (1934).

[11] Matter of Keenan, 314 Mass. at 550, 50 N.E.2d at 788.

[12] Matter of Keenan 313 Mass. at 219, 47 N.E.2d at 32.

[13] Matter of Keenan 314 Mass. at 549, 50 N.E.2d at 788.

[14] *Id.* at 551, 50 N.E.2d at 789.

[15] *See* Matter of Bennethum, 278 A.2d 831 (Del. 1971); Wolf's Petition, 257 So.2d 547 (Fla. 1972); Matter of Braverman, 271 Md. 196, 316 A.2d 246 (1974); Application of Sharpe, 499 P.2d 406 (Okla. 1972); Petition of Simmons, 71 Wash. 2d 316, 428 P.2d 582 (1967). These cases recognize the nature and character of the charge for which the petitioner was disciplined as pertinent to his application for reinstatement.

[16] 314 Mass. at 547, 50 N.E.2d at 787. Specifically, the *Keenan* Court noted:

> In deciding a case of this kind considerations of public welfare are wholly dominant. The question is not whether respondent has been "punished enough." To make that a test would be to give undue weight to his private interests, whereas the true test must

The Court stated the point quite concisely when, in considering the issue of reinstatement in the context of disbarment following the conviction of a crime, it said:

> A conviction of a crime, especially a serious crime, undermines public confidence in the [attorney]. The average citizen would find it incongruous for the . . . [government] on one hand to adjudicate him guilty and deserving of punishment and then on the other hand while his conviction and liability to punishment still stands [for the Commonwealth] to adjudicate him innocent and to retain his membership in the Bar.[17]

In the *Matter of Centracchio,* the only other reported Massachusetts decision prior to *Hiss* dealing with the reinstatement question, the Court echoed the stand it had taken in *Keenan* and denied reinstatement.[18] The petitioner was a district attorney, who, while serving as Special Justice of the District Court, had been found guilty of fee-splitting and attempting to influence witnesses. He was subsequently disbarred for this offense.[19] The *Centracchio* Court jealously guarded the prerogative of the Supreme Judicial Court to determine the worthiness of an applicant for reinstatement. The Court interpreted the *Keenan* decision as holding that there could be offenses so serious that an attorney who had committed one of them could never satisfy the Court that he was once again worthy of trust, and furthermore, could never prove that he would again inspire the necessary public confidence to perform the duties of an attorney.[20]

Therefore, after *Keenan* and *Centracchio,* Massachusetts appeared to fall squarely within that group of jurisdictions which, by the burden of proof imposed, made it virtually impossible for the readmission of an attorney previously adjudged guilty of a serious crime. Nothing short of a complete change of moral character and a guarantee against the repetition of future misconduct would apparently warrant readmission. Even with these conditions satisfied, however, the possibility remained that there would be some offenses so heinous that they would forever bar an individual from once again assuming the mantel of an officer of the Court. It is from this point of departure that the Board of Bar Overseers considered the petition of Alger Hiss in 1974. Quite simply, the *Hiss* case appears to have changed a good deal of the thinking concerning reinstatement in Massachusetts, and has had a substantial precedential impact upon readmission cases in other jurisdictions throughout the country.[21]

> always be the public welfare. Where any clash of interests occurs, whatever is good for the individual must give way to whatever tends to the security and advancement of public justice.

Id.

[17] In re Welansky, 319 Mass. 205, 208-09, 65 N.E.2d 202, 204 (1946).

[18] 345 Mass. 342, 187 N.E.2d 383 (1963).

[19] *Id.* at 346, 187 N.E.2d at 384.

[20] *See id.* at 346-48, 187 N.E.2d at 385-86; Matter of Keenan, 314 Mass. at 548-549, 50 N.E.2d at 788.

[21] *See* Matter of Raimondi and Dipple, 285 Md. 607, 403 A.2d 1234 (1979); Matter of

If any individual stood in a good position to challenge the stringent standards for readmission in Massachusetts, it was Alger Hiss. After receiving his degree from Harvard Law School in 1929, Hiss served as law clerk to Justice Holmes of the United States Supreme Court.[22] In the years following his clerkship he was admitted to the Bars of Maryland, Massachusetts and New York, and he practiced in both New York and Boston. During the New Deal Hiss went to Washington where he served first as Assistant General Counsel to the Agricultural Adjustment Administration, then on the staff of the Solicitor General of the United States and, finally, for over a decade in the State Department.[23] After instrumental work in the formation of the United Nations, Hiss assumed the position of President of the Carnegie Endowment for International Peace. While serving in this capacity, however, he was indicted for perjury stemming from his testimony before a federal grand jury.

The indictment charged that Hiss had committed perjury in testifying that neither he nor his wife in his presence had ever turned over documents or copies of documents belonging to the United States Department of State or any other organization of the federal government to Whittaker Chambers or to any other unauthorized person. In addition, Hiss was charged with falsely testifying in statements before the Committee on Un-American Activities of the House of Representatives that he had no prior contact with Chambers who was an admitted member of the Communist Party. On January 25, 1950, Alger Hiss was convicted on the two counts of perjury and sentenced to serve three and one half years at the United States Penitentiary in Lewisburg, Pennsylvania.[24] Hiss was disbarred following his conviction and on August 1, 1952, he was removed from the office of attorney-at-law in the courts of the Commonwealth.[25]

In considering Hiss' petition for reinstatement,[26] the Board of Bar Overseers was bound by the standards of section 18(4) of Rule 4:01 of the Supreme Judicial Court. According to these standards, the applicant for readmission must demonstrate sufficient moral qualifications and competency in the law, and also establish that his readmission would not be detrimental to the integrity and standing of the Bar, the administration of

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Wigoda, 77 Ill. 2d 154, 395 N.E.2d 571 (1979); Petition of Albert, 403 Mich. 346, 269 N.W.2d 173 (1978); Matter of Egger, 93 Wash. 2d 706, 611 P.2d 1260 (1980).

[22] Matter of Alger Hiss, Findings and Recommendations of the Board of Bar Overseers, No. J-74-151, slip op. at 11 (Mass. Sup. Jud. Ct. April 4, 1974) [hereinafter cited as Hiss, Findings and Recommendations].

[23] *Id.*

[24] *See* United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied,* 340 U.S. 948 (1951); *see also* United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd per curiam,* 201 F.2d 372 (2d Cir. 1952), *cert. denied,* 345 U.S. 942 (1953) (motion for new trial).

[25] *See* Matter of Alger Hiss, 368 Mass. 447, 448, 333 N.E.2d 429, 430 (1975).

[26] Matter of Alger Hiss, No. J-74-151 (Mass. Sup. Ct. filed Nov. 3, 1974).

justice, or to the public interest.[27] Hiss, by his own testimony before the Board, pinpointed the troublesome quandary between his crime and the standards applicable to reinstatement by commenting:

> In my case the charge was far worse than perjury as you must be aware. . . . I had two other charges worse than perjury, which I regard as absolutely reprehensible in a lawyer . . . failure of trust and failure of confidence, which is even worse for a lawyer.[28]

The Board took an extremely philosophical approach to the issues raised by the Hiss Petition based upon the precedent established by the *Keenan* and *Centracchio* cases. The Board reasoned that if it had been asked to find evidence of present good moral character and competence only, it would have been able to do so unanimously.[29] A number of prominent attorneys, professors of law and judges, including a former Solicitor General of the United States and a retired Justice of the United States Supreme Court, testified and submitted affidavits in Mr. Hiss' behalf and persuaded the Board of his present good moral character and legal ability.[30] Having determined these points, however, there remained the ever present fact that the judgment of conviction on which Hiss' disbarment was based had never been set aside, nor had he ever been pardoned for the offense. This fact, coupled with the holding in Massachusetts that the judgment of disbarment is evidence against the person so removed upon his subsequent petition for readmission to the Bar,[31] created a logical paradox which prevented the Board from recommending approval of the Hiss Petition to the Court.

If the Board was required to accept the finality of the judgment and verdict against Hiss, as it felt it must, then it was confronted with a dilemma. As long as a petitioner continued to assert his innocence, he was questioning the appropriateness of the decision which resulted in his conviction and subsequent disbarment. By asserting his innocence, however, a petitioner would make it logically impossible to show that he had repented or reformed from earlier wrongdoing. Yet this was the position taken by Alger Hiss. In his testimony before the Board, Hiss made the dilemma clear: "I have not had any complete change of moral character. I am the same person I have been throughout my life."[32] The very same assertion of innocence was presented in the *Keenan* case where the Court found that the petitioner seemed to recognize the binding nature of the Court's adjudication of guilt, but that he would not also allow admission

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[27] MASS. SUP. JUD. CT. R. 4:01, § 18(4).

[28] Hiss, Findings and Recommendations, *supra* note 22, at 13-14.

[29] *Id.* at 28, 32.

[30] *Compare id.* at 24–27 *with* In re Keenan, 314 Mass. 545, 549-50, 50 N.E.2d 785, 788 (1943).

[31] *See* Matter of Centracchio, 345 Mass. 342, 346, 187 N.E.2d 383, 385 (1963).

[32] Hiss, Findings and Recommendations, *supra* note 22, at 26.

of his own guilt or repentance.[33] A strictly logical approach to this point of view caused the Board in *Hiss* to conclude that such an assertion suggested not only a lack of moral improvement but also the disconcerting notion that the petitioner "gives evidence of his *present* lack of moral character when he again testifies as to his innocence of the original charge in the face of a conviction, which this Board, for the purposes of its deliberations, must accept as establishing the fact of his guilt."[34] In a jurisdiction that had heretofore required evidence of nothing more than a "complete change in moral character" prior to permitting reinstatement, repentance and reform appeared to be essential prerequisites to reinstatement.[35] Even Mr. Hiss recognized the conflict raised by his protestations of innocence in light of the *Keenan* and *Centracchio* decisions. He remarked in his testimony that "[i]f that's the law in Massachusetts, I am excluded."[36]

Upon this syllogistic argument, the Board found that it would be impossible to recommend the reinstatement of Mr. Hiss as long as *Keenan* and *Centracchio* stood as the law in Massachusetts. In fact, however, an examination of those two cases indicates that the Court had not applied the notion of repentance in the past as mechanically as the Board reported in its findings. Repentance was only one of several factors of relevance which were to be used in determining whether an applicant for reinstatement had shown sufficient proof of reformation in the years subsequent to disbarment to overcome the presumption of bad character. Indeed, Chief Justice Field, who was a member of the Court in *Keenan,* had written some years before that:

> Evidence of penitence for offenses proved may have weight as tending to show a change of character. But I do not rule that there may not be circumstances in which such a change may be shown without evidence of penitence. . . . [I do not] regard admission of guilt as necessarily a condition of his readmission to the Bar. Clear and convincing evidence of fitness for readmission may exist although the petitioner protested innocence of the charges of which he was found guilty and the adjudication of guilt stands as a legal and binding adjudication. . . . I do not regard assertions of innocence of adjudicated guilt and consequential lack of penitence therefore as necessarily fatal to readmission if the evidence of present fitness without the aid of penitence is clear and convincing.[37]

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[33] Matter of Keenan, 314 Mass. 544, 550, 50 N.E.2d 785, 788 (1943).

[34] Hiss, Findings and Recommendations, *supra* note 22, at 19-20 (emphasis added).

[35] A number of jurisdictions continue to maintain the view that a showing of reformation or moral rehabilitation is essential to reinstatement. *See, e.g.,* In re Bennethum, 278 A.2d 831 (Del. 1971); Wolf's Petition, 257 So.2d 547 (Fla. 1972); Florida Bar v. Johnson, 241 So.2d 161 (Fla. 1970); *see also* 70 A.L.R.2d 268 (1960).

[36] Hiss, Findings and Recommendations, *supra* note 22, at 26.

[37] In re Petition of Coakley, No. 3484, slip op. at 8-9, 51 (Mass. Sup. Jud. Ct. 1934). Other jurisdictions faced with similar protestations of innocence on the part of a petitioner for

While the Board of Bar Overseers denied Hiss' readmission based upon the perceived failure of reformation and contrition, the Bar Counsel took a different approach. The Bar Counsel took the more absolutist view that there may be offenses so serious as to forever bar reinstatement.[38] The notion that there are offenses "of such heinous character that under no circumstances could [a petitioner] demonstrate sufficient contrition and atonement to justify his reinstatement as a member of the profession" appears to be consistent with the *Keenan* and *Centracchio* decisions.[39] Furthermore, the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement advocated a similar position:

> [T]he nature of the offense and the circumstances surrounding it should be considered in evaluating an application for reinstatement. Thus the more serious the offense, the nearer it strikes at the heart of the administration of justice, the greater the affirmative proof that should be required of the applicant for the admission. For example, it is difficult to conceive of circumstances that would justify the reinstatement of an attorney who has been disbarred for bribing a juror.[40]

The Bar Counsel argued that because Hiss appeared before the Board and the Court convicted of perjury, he was burdened by the failure of public trust and confidence and tainted by the suggestion of espionage. Certainly, it is arguable that out of all the crimes a lawyer may commit, the presentation of false testimony under oath is one which strikes most deeply at the heart of trust and confidence in the system of justice. Considering this point, the Bar Counsel in essence argued that there was "no room in the profession of law for those who commit deliberate falsehood in court."[41]

The Supreme Judicial Court considered both the argument made by the Board and that made by Bar Counsel and, surprisingly, without overturning the earlier *Keenan* and *Centracchio* decisions, appeared to arrive at a new standard for readmission. The Court stated that "[n]either the controlling case law nor the legal standard for reinstatement to the Bar requires that one who petitions for reinstatement must proclaim his repen-

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reinstatement have realized that "to be reinstated, one need not express 'contrition' which is inconsistent with a position to which he honestly and sincerely adheres." Matter of Barton, 273 Md. 277, 282, 329 A.2d 102, 105 (1974); *see* Ex Parte Marshall, 165 Miss. 523, 551-52, 147 So. 791, 797 (1933); Matter of Braverman, 271 Md. 196, 202-03, 316 A.2d 246, 249 (1974).

[38] Matter of Hiss, 368 Mass. at 451-52, 333 N.E.2d at 433.

[39] *See id.* at 452, 333 N.E.2d at 433. *See* Matter of Bennethum, 278 A.2d 831, 833 (Del. 1971); *see also* Matter of Sleeper, 251 Mass. 6, 146 N.E. 269 (1925).

[40] ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* 155 (June 1970). *See* People v. Buckles, 164 Colo. 64, 453 P.2d 404 (1969); Application of Van Wyck, 225 Minn. 90, 29 N.W.2d 654 (1947).

[41] *See* Matter of Sleeper, 251 Mass. 6, 20, 146 N.E. 269, 274 (1925).

tance and affirm his adjudication of guilt,"[42] and thereby removed any doubt that might have surrounded that issue after the *Keenan* and *Centracchio* decisions. Because "mere words of repentance are easily muttered and just as easily forgotten,"[43] the *Hiss* Court reasoned that it is most important that the petitioner establish his ability to distinguish right from wrong in the conduct of men towards each other so as to indicate to the court that he is a fair and safe person to engage in the practice of law.[44] A flexible approach to admission of past guilt was necessary, the Court argued, because although prior judgments are dispositive of all factual issues and prevent attorneys from re-litigating issues of guilt in reinstatement proceedings, miscarriages of justice are possible.[45] According to the Court, both simple fairness and fundamental justice require that a person who believes he is innocent though convicted should not be required to confess guilt through a criminal act he honestly believes he did not commit.[46] To hold otherwise, the Court observed, would be to view the system of justice as incapable of error and to raise an impossible paradox for a petitioner:

> [H]e may stand mute and lose his opportunity; or he may cast aside his hard retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law. Men who are honest would prefer to relinquish the opportunity conditioned by this rule. . . . Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, will be tempted to commit perjury by admitting to a non-existent offense (or to an offense that they believe is non-existent) to secure reinstatement.[47]

Just as the Court determined that the Board's philosophical approach to rehabilitation did not require an admission of guilt, it also determined that the Bar Counsel's view that there were some crimes so serious as to forever bar reinstatement was not a clear standard applicable to reinstatement cases. The Court stated that:

> We cannot now say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs, drawing from conduct and social interactions, that he has achieved a "present fitness" . . . to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions.[48]

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[42] Matter of Hiss, 368 Mass. at 455, 333 N.E.2d at 435.

[43] *Id.* at 457, 333 N.E.2d at 436.

[44] *Id. See* In re Koening, 152 Conn. 125, 127, 204 A.2d 33, 35 (1964); In re Stump, 272 Ky. 59, 598-99, 114 S.W.2d 1094, 1096 (1938).

[45] Matter of Hiss, 368 Mass. at 457, 333 N.E.2d at 436.

[46] *Id.* at 458, 333 N.E.2d at 437.

[47] *Id.* at 458-59, 333 N.E.2d at 437 (citations omitted).

[48] *Id.* at 452, 333 N.E.2d at 433 (citations omitted). The Court recognized that a holding that an offense resulting in disbarment was so serious as to forever deny reinstatement,

Having resolved that neither the refusal to admit guilt nor the nature of the crime committed precluded readmission, the *Hiss* Court was left to focus upon the more abstract and subjective issue of present good moral character. Once rehabilitation becomes a possibility in any instance, then the factors to be weighed in determining the worthiness of a petitioner for reinstatement inevitably reduce themselves to a consideration of the passage of time since disbarment and an examination of the experiences of the applicant during the period of banishment from the bar. In fact, the *Hiss* Court noted in its decision that a long time span between disbarment and a petition for reinstatement, during which the petitioner's conduct was exemplary, reinforces his claim of rehabilitation[49] and contributes to a finding of present good moral character which, the Court indicated, in and of itself demonstrates rehabilitation.[50]

In the *Hiss* case, however, it is apparent that the Court meant something more concerning the petitioner when it commented that "[t]ime and experience may mend the flaws of character which allow the immature man to err."[51] The effect of the passage of time apparently weighs not only on the petitioner, but also on those who sit in judgment of him. When the Court looked back over the years to judge the event in light of present realities, and when it argued that justice and those responsible for its administration may often err, it was not looking so much at the repentance and rehabilitation of the petitioner, Alger Hiss, but at the changing climate of political opinion which persuaded the Court to reconsider the propriety of the original conviction.

Unfortunately for the Court in considering the future interpretation of the *Hiss* decision, the crime of perjury, unlike a conviction rooted in political subjectivity such as a violation of the Smith Act,[52] is a criminal offense of the utmost seriousness to the legal profession, the courts and the public. No policy argument could be made to change this fact, even though there was a tremendous sense that Alger Hiss had been caught in the same witch-hunt that had ruined the lives of so many during the years immediately following World War II. Little, therefore, could be said by the Supreme Judicial Court about changes in prosecutorial attitudes, the right to dissent, or detente with communist nations, because no matter

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irrespective of good conduct or reform, might raise constitutional problems. *Compare* Vlandis v. Kline, 412 U.S. 441 (1973); Leary v. United States, 395 U.S. 6 (1969); Barnes v. United States, 412 U.S. 837 (1973) *with* Weinberger v. Salf, 422 U.S. 749 (1975).

[49] Matter of Hiss, 368 Mass. at 460 n.19, 333 N.E.2d at 438 n.19.

[50] *Id.* at 461 n.22, 333 N.E.2d at 438 n.22.

[51] *Id.* at 454, 333 N.E.2d at 434.

[52] *See* Matter of Braverman, 221 Md. 196, 316 A.2d 246 (1974). In *Braverman* the court was able to reinstate a disbarred attorney and at the same time confront directly the changing political realities which drew into question the original conviction under the Smith Act.

how much the Court desired to take judicial notice of the changes which had occurred in society generally, the underlying problem would not wash away: Alger Hiss was found guilty of perhaps the most serious crime a lawyer could commit, perjury. Faced with such a legal reality, the Court nevertheless responded to contemporary social and political pressure and found that in Hiss' case "present and good moral character" itself "demonstrates rehabilitation."[53] Certainly, such a view seems inconsistent with the *Keenan* and *Centracchio* decisions. The very concept of disbarment suggests permanency in the eyes of the public. Yet after the *Hiss* decision it was no longer possible in Massachusetts to describe when such an extended disability would exist. Instead, disbarment appeared after the *Hiss* case to be a condition which invited rehabilitation. "Time and experience," the Court said, "may mend the flaws of character which allowed the immature to err, the chastening effect of disbarment may ultimately redirect the energy and reform the values of even the mature miscreant. There is always potentiality for reform. . . ."[54]

The message of the *Hiss* decision suggested that the mere passage of time was a testimonial to the potentiality for reform. It could be argued after *Hiss* that the Court had concluded that living an honest and decent life for a sufficient period of time following disbarment would, in itself, provide the foundation for reinstatement. The door appeared to be open to those attorneys who were disbarred for the most serious crimes to be reinstated following a sufficient passage of time, regardless of the public perception of the prior immoral conduct. The variable, therefore, appeared to be time, and as such the passage of time served as the guidepost for the case immediately following *Hiss,* the petition of Richard K. Gordon.

Perhaps in response to these inferences that could be drawn from the *Hiss* decision, the Court took the opportunity in its *Survey* year decision in the *Matter of Richard K. Gordon* ("*Gordon* II")[55] to retreat from any overly liberal view of reinstatement. From all outward appearances, the case would seem to have been easily decided in favor of reinstatement based upon the precedent of the landmark *Hiss* decision. The circumstances surrounding the Gordon petition were not significantly dissimilar from those surrounding the petition of Alger Hiss. Richard K. Gordon was convicted on April 16, 1963 of larceny, a felony, and conspiracy to commit larceny, a misdemeanor, in connection with the so-called "Boston Common Garage" cases[56] which the Court referred to as a "notori-

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[53] Matter of Hiss, 368 Mass. at 461 n.22, 333 N.E.2d at 438 n.22.

[54] *Id.* at 454, 333 N.E.2d at 434.

[55] 385 Mass. 48, 429 N.E.2d 1150 (1982).

[56] *See* Commonwealth v. Kiernan, 348 Mass. 29, 201 N.E.2d 504 (1964).

ous saga of corruption and theft."[57] In particular, Gordon was found to have been involved in a plan devised by the Chairman of the Massachusetts Parking Authority to obtain $310,000 in return for the contract to build the garage. As part of this conspiracy, Gordon received three checks totalling $100,000 as payment for legal services he never performed. Gordon subsequently gave $85,000 to one of his co-conspirators. In addition, as treasurer of the Granite State Realty and Construction Company, Gordon accepted a $40,000 check for erecting four construction buildings and a $25,000 check for setting up fences under a fictitious sub-contract. Subsequently, Gordon and the co-conspirator personally withdrew the funds deposited to the account of the corporation.[58]

Gordon served a total of twenty months of the sentences imposed in connection with his crimes. Prior to these events, he had practiced law in Massachusetts since 1948, and in 1956 he had been appointed Special Justice of the Third District Court at Ipswich. He was serving as a judge of that court at the time the incidents leading to his conviction occurred.[59] Gordon was disbarred by the Supreme Judicial Court following his conviction and sentencing on March 26, 1965.[60]

By all accounts, following the events which led to his conviction, and in the years following his release from prison, Gordon lived a decent life. He was for a time comptroller of a small electronics corporation and, later, self-employed as a tax consultant. He had not been disbarred from practice before the United States Tax Court.[61]

The petition brought by Gordon before the full bench was, in fact, his second application for re-admission. The first petition ("*Gordon* I") was filed on September 13, 1976, and, following hearings before the Board, decided by a Single Justice on July 19, 1978.[62] At the time of the first petition, Bar Counsel had stipulated that Gordon was of present good moral character. Both the Board of Bar Overseers and Justice Kaplan agreed with this view, but found it to be only one aspect of the consideration to be given to a petition for reinstatement. In spite of Gordon's *present* good moral character, both the Board and Judge Kaplan were constrained to note that the public memory of the events surrounding Gordon's conviction and disbarment, as well as his position as a judge of a court of the Commonwealth at the time of the criminal acts and at the time of the events resulting in his conviction and disbarment, militated against certifying him as fit for reinstatement.[63] Such a view was consistent, it

[57] 385 Mass. at 56, 429 N.E.2d at 1156.
[58] *Id.* at 56-57, 429 N.E.2d at 1156.
[59] *Id.* at 50-51, 429 N.E.2d 1153.
[60] *Id.* at 48, 429 N.E.2d 1152.
[61] *Id.* at 51, 429 N.E.2d 1153.
[62] *See id.* at 49, 429 N.E.2d at 1152.
[63] *Id.*

appeared, with decisions *prior* to *Hiss* which held that the acts leading to disbarment and the state of facts existing at the time of such conduct must weigh heavily against a petitioner even in the face of a showing of present good moral character.[64] Nevertheless, as part of his decision, Justice Kaplan specifically noted that his findings were without prejudice to the filing of the second petition for readmission at a later date.[65]

In reviewing Gordon's second application for reinstatement, the Supreme Judicial Court noted the disposition of the earlier petition, but conceded that there were a number of differences in the second instance. Of primary importance was the fact that the Board, which had opposed the first petition, was now supporting Gordon's reinstatement.[66] With no opposition from those who had argued against the first application, including the Attorney General of the Commonwealth, the Massachusetts Bar Association and the Essex County Bar Association, the Board reversed the position it had taken in *Gordon* I and decided that Gordon's present professional and moral fitness should prevail over the public memory of his past conduct. Further, the Board saw no meaningful distinction between the period of the *Hiss* disbarment, 23 years, and that suffered by Gordon, 16 years.[67]

In contrast to *Gordon* I, only the Bar Counsel opposed the application for readmission in *Gordon* II.[68] As a matter of procedural precedent, such an assertion of independence by the Bar Counsel from ties to the Board, and the ability to speak in a separate and opposing voice to that of the Board, was an important consideration for the Office of Bar Counsel. The Rules of Court and the Rules of the Board of Bar Overseers are less than clear concerning the independence of Bar Counsel with respect to such recommendations. To the extent that the Court accepted the right of Bar Counsel to stand alone, in opposition to the Board, on the issue of Gordon's reinstatement, *Gordon* II is of procedural significance because it confirms the growing independence of the Office of Bar Counsel.

Having recognized *sub silentio* the ability of Bar Counsel to stand alone in opposition to the Board, the Supreme Judicial Court reviewed the present petition in light of the standards established by it in the *Hiss* decision. The Court acknowledged the issues raised by Bar Counsel, and outlined these considerations with respect to the reinstatement petition. In particular, these concerns included whether the attorney was mature in age and experience; whether his transgression was an isolated instance, or did he continually flout the law in a course of recurring conduct; whether

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[64] *See supra* notes 10-21 and accompanying text.

[65] 385 Mass. at 49, 429 N.E.2d at 1152.

[66] *Id.* at 56, 429 N.E.2d at 1156.

[67] *Id.*

[68] *Id.* at 54-56, 429 N.E.2d at 1154-55.

the offenses committed were relatively minor violations or of major significance; whether his act was the result of sudden passion, or deliberate, requiring premeditation, a carefully formed plan, and the continuance of a corrupt purpose long enough to carry that plan into effect; and whether he was driven to the offenses by compelling financial necessity or, instead, they were the result of some internal weakness of character.[69]

By establishing specific concerns regarding the moral status of the petitioner at the time of the commission of his crime, the Court refined the method by which it would compare the past moral condition of a petitioner to his present moral fitness. As such, the further factors considered by the Court helped narrow the broad issues raised by the Court in *Hiss* and also applied in *Gordon* II:

> (1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) the time elapsed since the disbarment and (5) the petitioner's present competence in legal skills.[70]

While the Court found that it could answer favorably issues with respect to Gordon's present competence and legal skills and *present* moral character, it had considerably more difficulty with questions relating to the potential impact of his reinstatement:

> The nub of the question is whether his resumption of practice will have an actual effect upon the integrity of the bar and thereby on the administration of justice and the public interest. In this inquiry we are concerned not only with the actuality of the petitioner's morality and competence, but also on the reaction to his reinstatement by the bar and public.[71]

Bar Counsel urged that the issue was not merely the present good moral character of Mr. Gordon, but rather the totality of his conduct including the effect of the evidence of his lack of moral character at the time that he committed the offenses for which he was convicted.[72]

The Court, however, refused to define the process by which past moral conduct would be balanced against present good moral character. In doing so, the Court avoided one of the most troublesome issues left open by the *Hiss* case, namely, the effect of the passage of time upon a specific disbarment case. Specifically, by refusing to determine how to weigh a lengthy period of good conduct against a past bad act, criminal or otherwise, the Court left open the question of how long one should stay away

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[69] *Id.* at 54, 429 N.E.2d at 1155.

[70] *Id.* at 52, 429 N.E.2d at 1154.

[71] *Id. See also* People v. Buckles, 167 Colo. 64, 453 P.2d 404 (1969); Matter of Bennethum, 278 A.2d 831, 833 (Del. 1971); People ex rel. Chicago Bar Assn. v. Reed, 341 Ill. 573, 173 N.E. 772 (1930); Application of Van Wyck, 225 Minn. 90, 20 N.W.2d 654 (1947). Some jurisdictions are so concerned about the effect of reinstatement that they attempt to make it virtually a permanent disability where a serious crime was involved. *See supra* note 5.

[72] 385 Mass. at 54, 429 N.E.2d at 1154-55.

from practice beyond the minimum five year period set by the Court and Board rules.[73]

Instead, the Court found that it could refuse reinstatement on the basis of the effect that such reinstatement would have upon the administration of justice, the Bar, and the public interest.[74] The Court viewed the effect of reinstatement as an indicator to the public and the Bar that the original offense was of limited gravity. While the impact of reinstatement upon the public and the Bar was a relevant issue in the *Hiss* case, the Court seemed to avoid dealing with these issues in *Gordon* II, preferring instead to focus on measurements of the moral character of the individual. In the *Hiss* case, like the *Gordon* II Petition, there was no outside opposition to the reinstatement. And yet, while the Court in *Hiss* chose not to focus upon the generalized effect upon the public of reinstatement of a disbarred attorney convicted of perjury, the *Gordon* II Court made the nature of the crime and the circumstances surrounding it the touchstone upon which the public perception of the Bar and the administration of justice would be adversely affected.

By focusing upon the present public perception of the original crime, the Court further enhanced the variables at its disposal for determining when an applicant is properly acceptable for reinstatement. While the concurring opinion of Justice Lynch[75] and the dissenting opinion of Justice Nolan[76] saw no real difference between the *Gordon* and *Hiss* applications, the majority of the Court nevertheless expanded its standard, focusing not only on the passage of time, not only on present moral character and not merely upon the seriousness of the prior crime, but also on the present impact upon the public of the nature of the offenses in the context of present day political consciousness:

> We agree that the effect of this decision upon Gordon and his future is important, but the effect upon the interests of the public and its confidence in the bar is of overriding importance. Further, the ultimate duty of decision rests with this Court. In recent years there has been wide-spread and frequent publicity about corruption related to public contracts. We think that public perception of a reinstatement of Gordon at this time would in high probability reflect badly upon the reputation of the bar for integrity,

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[73] Consider the following remarks attributed to a former bar association president:

> I for one don't any longer know what rehabilitation means in this context. Theologically, rehabilitation implied an acknowledgement of the commission of sin, a contrite heart, a true spirit of repentance. As nearly as I can figure out by our procedures, rehabilitation means that for some period of time following disbarment, the man has not been in trouble.

Problems and Recommendations in Disciplinary Enforcement, supra note 40, at 153.

[74] 385 Mass. at 55, 429 N.E.2d at 1155.

[75] *Id.* at 58-59, 429 N.E.2d at 1157 (Lynch, J., concurring).

[76] *Id.* at 59, 429 N.E.2d at 1157 (Nolan, J., dissenting).

particularly because Gordon was a judge who was involved in notorious crimes concerning public contracts.[77]

While the public perception of the Bar, whether that perception be favorable or adverse, was clearly important in considering the Hiss Petition, the Court chose to deal only obliquely with the issue in that case. Why the Court chose to focus on this issue in the *Gordon* case can only be left to speculation. What is clear is that along with the passage of time, and along with present good moral character, an applicant must consider the social and political impact that his readmission will have upon the public perception of the legal profession. Although the Court left itself room to distinguish future cases by noting that Gordon was both a judge and a lawyer at the time of his disbarment, there is no suggestion in the decision that one who was only a lawyer would not face the same scrutiny with respect to public perception of the effect of his reinstatement.[78]

In the final analysis, whether the *Gordon* II decision is the result of a particular moment in our history when the honesty of public officials and white collar crime is a paramount concern, or whether the actual standards employed by the Court will reveal themselves in future cases, is again a matter that can only be left to speculation. What is clear, however, is that the Court was not completely satisfied with the suggestion that the *Hiss* case left the door completely open in Massachusetts to reinstatement of disbarred attorneys who, through the mere passage of time, had established their present good moral character. Past acts and the current public reaction to those past acts would, the Court stated in *Gordon* II, weigh heavily in any consideration of the readmission of a disbarred attorney.

§ 12.3. Conflict of Interest. The restrictions imposed by Canon 5 of the Code of Professional Responsibility and particularly Disciplinary Rule 5-105[1] weigh heavily upon attorneys whose practice results in the devel-

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[77] *Id.* at 58, 429 N.E.2d at 1157. Although the Court refers to Gordon's status as a judge as well as a lawyer, this does not appear to be the touchstone upon which the denial of the petition rests. *But see* Matter of Troy, 364 Mass. 15, 71, 306 N.E.2d 203, 234-35 (1973); Matter of De Saulnier (No. 4) 360 Mass. 787, 811, 279 N.E.2d 296, 309 (1972).

[78] *See supra* note 76.

§ 12.3. [1] Disciplinary Rule 5-105 of the Code of Professional Responsibility, which appears in Supreme Judicial Court Rule 3:07 (effective January 1, 1981), provides as follows:

DR 5-105. *Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.*

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely

opment of particular specialties or specific expertise in litigation matters. The chances of being either simultaneously or subsequently on both sides of a case or of challenging a former client are substantial and affect the choice of counsel by clients, the time expended in litigation, and the economics of legal representation. It is a common tactic, particularly where counsel is providing effective representation, for an opponent to attempt to remove that counsel by a motion to disqualify where differing interests or a conflict of interest may exist in a particular legal matter. The result is a miring of the court processes in the name of preserving the independent judgment of a lawyer and the confidences and secrets of a client.

Because the issues posed by multiple representation often arise in the context of complex legal matters where the economics of representation and the particular expertise of a lawyer or law firm are of primary concern, cases involving conflict of interest and Canon 5 are not uncommon.[2] During the *Survey* year in *McCourt Co., Inc. v. FPC Properties, Inc.*[3] the Supreme Judicial Court grappled with the combined issues of conflict of interest, consent and confidential client relationships. The Court's decision in *McCourt* is indicative of the complexity and significance of the conflict problem for the legal profession.

The Court referred to the conflict of interest problem in *McCourt* as one of simultaneous representation.[4] Simultaneous representation is a subcategory of multiple representation of differing or conflicting interests that is defined in court decisions rather than in the Code of Professional Responsibility.[5] Simultaneous representation has been distinguished from successive representation where an attorney represents an opponent of a former client. In the former instance issues of independent judgment are said to be paramount; in the latter the conflict is said to be in the possible

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affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment.

[2] *See* Commonwealth v. Geraway, 364 Mass. 168, 301 N.E.2d 814 (1973); Parsons v. Continental National American Group, 535 P.2d 17 (Ariz. Ct. App. 1975); In re Kamp, 40 N.J. 588, 194 A.2d 236 (1963); Jedwabny v. Philadelphia Transportation Co., 390 Pa. 231, 135 A.2d 252 (1957), *cert. denied,* 355 U.S. 966 (1958).

[3] 386 Mass. 145, 434 N.E.2d 1234 (1982).

[4] *Id.* at 147, 434 N.E.2d at 1236.

[5] *See* cases cited *supra* note 2.

use of client confidences.[6] Such a distinction is unfortunately overly simplistic. The question of the use of information obtained from a client in a present or past representation is just as significant in both types of conflict situations. What is essential in each instance is that the attorney shoulder the burden of demonstrating that he can adequately represent the interest of each client and that such representation will not adversely affect the exercise of his independent professional judgment on behalf of each.[7] Further, and of separate significance, is that even if the lawyer determines that he can exercise his independent professional judgment on behalf of each client, there must be consent to the joint representation by *each* client after full disclosure of the possible effect of such representation upon the exercise of the necessary independent professional judgment.[8]

The combined problems of differing interests in simultaneous representation and consent to simultaneous representation are at the heart of the Court's concern in the *McCourt* case. The action was one to disqualify the law firm of Parker, Coulter, Daley and White from representation of the McCourt Company in an action seeking specific performance of an option agreement and damages against FPC Properties with respect to certain property in the Fort Point Channel area of Boston.[9] FPC Properties was a wholly owned subsidiary of Cabot, Cabot and Forbes Co., which was named as a defendant, along with FPC, as guarantor of certain obligations of FPC Properties. Apparently, Parker, Coulter represented and continues to represent Cabot, Cabot and Forbes in the defense of personal injury actions.[10] As a result, counsel for the defendant FPC brought an action to disqualify Parker, Coulter on the basis of simultaneous representation of differing interests.[11] Parker, Coulter argued that disqualification of counsel was not required in every instance of simultaneous representation, noting that the important determining factor was whether confidences or secrets that could be used against Cabot, Cabot and Forbes had been entrusted to counsel representing the allegedly conflicting interest. Further, Parker, Coulter argued that the dual representation would not affect or have any adverse impact upon its adversary posture towards Cabot, Cabot and Forbes in this action.[12]

The hallmark case which establishes the point of departure for deter-

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[6] *See* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 45 (1976).

[7] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) and (B). *See supra* note 1.

[8] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C). *See supra* note 1.

[9] 386 Mass. at 147, 434 N.E.2d at 1236.

[10] *Id.*

[11] *Id.*

[12] *Id.*

mining when differing interests are improperly represented either in simultaneous or successive matters is *T.C. & Theatre Corp. v. Warner Brothers Pictures*.[13] In that case, a federal district court in New York determined that the lawyer or law firm charged with dual representation should have the virtually impossible burden of demonstrating that no confidences or secrets had been obtained in the course of prior representation which could be used to the advantage of one party against the other in the present action.[14] Essentially, *T.C. & Theatre Corp.* required that the lawyer accused of the conflict prove the negative. Once the complaining client has alleged a substantial relationship between the prior representation and the present representation, the burden of proof shifts to the attorney who is required to demonstrate that he has *not* obtained such secrets or confidences so as to offend Canons 4 or 5 of the Code of Professional Responsibility.

T.C. & Theatre Corp. suggests a standard for rather obvious problems of representation with respect to differing interests. There can be little argument that where there is the potential for an attorney utilizing facts which he would not have obtained but for a prior representation of a client, the present Disciplinary Rule 5-105 (A) and (B) would require withdrawal on the basis of the possibility of an "adverse effect" upon the present representation.[15] The issue presented in the *McCourt* case, however, is an even more subtle refinement of the "substantial relationship" test established in *T.C. & Theatre Corp.* and combines problems of both prior and simultaneous representation.

In *McCourt,* the Court assumed that the plaintiff, McCourt, had consented to Parker, Coulter's representation of it in both an action against another client of Parker, Coulter, FPC Properties and Cabot, Cabot and Forbes, and to Parker, Coulter's prior and continuing representation of Cabot, Cabot and Forbes in personal injury actions involving third parties unrelated to the present law suit. There was no indication, however, of consent by Cabot, Cabot and Forbes or FPC Properties to the representation of McCourt by Parker, Coulter. It was this question of whether there was knowing and willing consent by Cabot, Cabot and Forbes to the representation of McCourt by Parker, Coulter which raised the most important issue in the *McCourt* case, namely, whether Parker, Coulter could continue to exercise independent judgment while having both a present and prior relationship with the defendant.[16]

The Court accepted the *McCourt* case as an interlocutory appeal from

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[13] 113 F. Supp. 265 (S.D.N.Y. 1953).

[14] *Id.* at 268-69.

[15] *See supra* note 1 and text accompanying note 7.

[16] *See* IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978); Cinema 5 Ltd. v. Cinerama, Ltd., 528 F.2d 1384 (2d Cir. 1976).

the superior court.[17] In examining the trial judge's decision to allow the continued representation of McCourt by Parker, Coulter, the Court found that the standards and burden of proof applied by the superior court were not appropriate.[18] Essentially, in overturning the lower court decision the Supreme Judicial Court adopted the views of the United States Courts of Appeals for the Second and Third Circuits as set forth in *Cinema 5 Ltd. v. Cinerama Ltd.*[19] and *International Business Machines Corp. v. Levin.*[20] Both of those decisions present a strong argument for disqualification of counsel even though the moving party fails to demonstrate a specific breach of a confidence occurring in the simultaneous representation or a specific issue upon which the independent judgment of the attorney could be put in question.[21]

Under Disciplinary Rule 5-105 (A) and (B) as it appeared at the time of the decisions in *IBM* and *Cinema 5,* an attorney was proscribed from representation if "the exercise of its independent professional judgment in behalf of a client will be or is likely to be *adversely affected* by his representation of another client."[22] At the present time, both parts (A) and (B) of the rule have been amended to also restrict multiple employment "if it would be likely to involve [the lawyer] in representing *differing interests.*"[23] Differing interests are defined by the Code of Professional Responsibility as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[24] Essentially, *McCourt* identified the concept of "differing interests" with that of "adverse effect" by adopting the *Cinema 5* and *IBM* definitions as roughly the equivalent of differing interests.[25] Both *Cinema 5* and *IBM* found that the

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[17] 386 Mass. at 148, 434 N.E.2d at 1236. The propriety of an interlocutory appeal of a denial of a motion for disqualification of counsel is an issue that has yet to be decided by the Supreme Judicial Court. The federal courts have generally refused appellate review of an order denying disqualification of counsel until after final judgment on the merits of the underlying case. *See id.* at 148 n.2, 434 N.E.2d at 1236 n.2 (citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981)). Although the Court's action in *McCourt* would appear to sanction such an interlocutory appeal, the Court stated that the question remained open because the matter before it came to the full bench of the Court from a single justice of the Appeals Court. The Court's rationale for allowing the interlocutory appeal in *McCourt* is based on a slender distinction, however, and places the Court in a position where it will no doubt have to decide the propriety of interlocutory appeals of motions for disqualification in the forseeable future.

[18] *Id.* at 148, 434 N.E.2d at 1236.

[19] 528 F.2d 1384 (2d Cir. 1976).

[20] 579 F.2d 271 (3d Cir. 1978).

[21] *See* 528 F.2d at 1386; 579 F.2d at 279-280.

[22] *See* 386 Mass. at 149 n.3, 434 N.E.2d at 1237 n.3.

[23] *See supra* note 1.

[24] *See* SUP. JUD. CT. R. 3:07 (Definitions).

[25] *See* 386 Mass. at 149 n.3, 434 N.E.2d at 1237 n.3.

propriety of an attorney's multiple representation must be determined not so much by the substantial relationship of issues in the litigation as by determining whether the lawyer is exercising the undivided loyalty which an attorney owes to each of his clients.[26] Therefore, the issue is not merely the temptation to utilize confidences or secrets of a client to the client's disadvantage as set forth in the *T.C. Theatre* case, but rather the basic fiduciary obligation that "no man can serve two masters" regardless of whether there is a substantial relationship between the representation that the lawyer has undertaken on behalf of the client and the representation that puts the lawyer in opposition to that client. As the court in *Cinema 5* put it:

> [T]he "substantial relationship" test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of the former client has been terminated and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.[27]

It is clear that the Supreme Judicial Court has chosen to impose a heavy burden upon a lawyer or law firm in Massachusetts which undertakes multiple representation, even though the litigation is unrelated to other work undertaken by the lawyer for one of the litigants. The Court's view is consistent with that of the Third Circuit in recognizing that:

> [I]t is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adverse posture towards that client in another legal matter. For example, a possible effect on the quality of the attorney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney.[28]

Having adopted the strong prophylactic rule of *IBM* and *Cinema 5*, it would appear that the only basis upon which an attorney or law firm could satisfy the burden of demonstrating the reconciliation of differing interests in Massachusetts would be to establish knowing consent on the part of the client subject to the adverse representation.[29] Unfortunately, this leaves open the question of whether a client, unschooled in the technical aspects of the law, can ever give such valid consent to simultaneous representation. The Court, however, failed to analyze this difficult problem in the

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[26] 528 F.2d at 1386; 579 F.2d at 280.

[27] 528 F.2d at 1387 (citation omitted).

[28] 579 F.2d at 280; *see* 386 Mass. at 149, 434 N.E.2d at 1236-37.

[29] *See* 386 Mass. at 146, 434 N.E.2d at 1237.

McCourt decision, and assumed that such consent is both possible and necessary.

Rather than examine the consent issue, the Court focused upon the argument of Parker, Coulter that an exception to multiple representation should be fashioned where a commercial corporation rather than a natural person is involved as a client.[30] Large corporations, it was argued, may distribute legal business to many law firms and lawyers with a view to barring any such firms and attorneys from handling cases against the corporation.[31] Arguably, Parker, Coulter suggested, if Cabot, Cabot and Forbes spreads its business around to enough lawyers and law firms, it will become impossible for opponents of Cabot, Cabot and Forbes to gain adequate representation because each opponent is more likely than not to hire a lawyer with some prior or current relationship to Cabot, Cabot and Forbes. As persuasive as this argument might be, the Court found no basis on the facts before it[32] for creating a distinction between corporations and natural persons within either the differing interest definition of Disciplinary Rule 5-105 in the Code itself, the proposed new ABA Model Rules of Professional Conduct,[33] or in the case law and opinions relevant to the subject.[34]

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[30] 386 Mass. at 149, 434 N.E.2d at 1238.

[31] *Id.* at 149-150, 434 N.E.2d at 1238.

[32] *Id.* at 151, 434 N.E.2d at 1238.

[33] The ABA Proposed Model Rules, in pertinent part, state:

Rule 1.7. Conflict of Interest; General Rule

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:

(1) The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interest of the client; and

(2) The client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Ordinarily, a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against an enterprise in an unrelated matter if doing so will not affect the lawyer's conduct of the suit and if both clients consent upon disclosure.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, at 49 (Proposed Draft 1981).

[34] *See, e.g.*, IBM v. Levin, 579 F.2d 271 (3d Cir. 1978); Chateau de Ville Productions v. Tams-Whitmark Music Library, 474 F. Supp. 223 (S.D.N.Y. 1979); Grievance Comm. v.

By disqualifying Parker, Coulter, the Court clearly stated that a client's interest in a counsel of its choice cannot predominate in all instances. The right to retain a particular lawyer is not absolute where that choice would raise a question of the loyalty of the attorney. In such circumstances, the *McCourt* decision suggests that the maintenance of the integrity of the legal profession and its high standing in the community are as important as the obligation to provide effective counsel, particularly where conflict of interest is a concern. Apparently, the Court has chosen to favor the public perception of impartiality over the impediments that disqualification of counsel imposes upon the client in the efficient disposition of matters before the courts of the Commonwealth and has reiterated the philosophy of Justice Storey who once observed:

> When the client employs an attorney, he has the right to presume, if the latter be silent on the point, that he has no engagements which interfere in any degree with his exclusive devotion to the cause confided in him; that he has no interest, which may betray his judgment, or endanger his fidelity.[35]

The Supreme Judicial Court apparently has made a difficult choice in the *McCourt* case in favor of disqualification and against multiple representation. The decision places in the hands of corporate clients and other entities who customarily use legal talent extensively, the tactical ability to raise a motion for disqualification against those attorneys who they have used in the past, or are using at present, even though the matter in which they are opposed is unrelated to the current multiple representation. Such a result is particularly disturbing in areas of practice where the number of attorneys who have gained unique expertise is limited, such as in patent, bankruptcy and anti-trust law. In those instances, client choices will be limited not only by the scarcity of experts, but by the fact of the expert attorney's prior and current representation.

Finally, the Court left undetermined an important issue relating to expense and proper disposition of the work product of a disqualified attorney. Hopefully, the Court will determine that the work product of a disqualified attorney is available to new counsel where there has been no showing that substantial harm will result as to matters at issue in the current litigation. As long as there is no showing by the moving party that injury would result from the transfer of the work product, it would appear appropriate to allow the client to obtain the work product as a means to expedite the litigation and avoid costly inconvenience to the client who has suffered the disqualification of counsel.[36] The Court, hopefully, sug-

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Rottner, __ Conn. __, 203 A.2d 82 (1964); In re Gillard, 271 N.W.2d 785 (Minn. 1978); In re Cohn, __ N.J. __, 216 A.2d 1 (1966); In re Hansen, 586 P.2d 413 (Utah 1978). These cases are cited in the ABA Proposed Model Rules. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, at 54 (Proposed Draft 1981).

[35] Williams v. Reed, 3 F. Cas. 405, 415 (C.C.D. Me. 1824) (No. 17,733).

[36] *See* IBM v. Levin, 579 F.2d 271, 283 (3d Cir. 1978).

gested as much when it noted that Parker, Coulter was not involved in any unethical conduct in the *McCourt* case, but merely in an honest disagreement concerning the appropriate application of the Code of Professional Responsibility to continuing representation.[37]

§ 12.4. Trial Conduct — Prosecutorial Misconduct. Although the facts in the *Survey* year decision of *Commonwealth v. Hoppin*[1] present a rather straightforward example of professional misconduct by a prosecutor during final argument, the decision provides an interesting examination of the standards of conduct applicable to both the prosecution and defense in criminal matters before the trial courts of the Commonwealth. The issues considered by the Court include not only permissible standards for final argument, but also the manner in which materials, not previously introduced into evidence but discussed during the trial, may find their way into closing arguments by way of props or direct reference. In addition, the case questions the limits to which counsel may go in embellishing and elaborating upon emotional issues at the close of the case.

In *Hoppin,* a criminal defendant was charged with rape, assault and battery by means of a dangerous weapon, kidnapping, and receipt of stolen goods.[2] Apparently, the defendant used a length of leather to bind the hands of his victim during the rape. The defendant had known the victim as a friend prior to the incident and had heard from the victim that her boyfriend was both abusing and defrauding her. On the day of the alleged criminal acts, the defendant told the victim that he had killed her former boyfriend and two companions and that he would "have" her in payment for his services.[3] The police investigation following the complaint by the victim produced a knife, a stolen gun, ammunition and marijuana, but no length of leather.[4] Although the prosecutor referred to the means by which the victim was bound, no demonstrative prop was used during the trial, nor did the judge receive any notice at the bench conference prior to final argument that the prosecutor was going to use a leather thong to graphically describe the event.[5] Nevertheless, the prosecutor wrapped a half inch length of leather around his fist and kept it there for thirteen minutes during his closing argument. The judge, however, was not in a position to see the leather, and because of this, he overruled an objection of the defense to the prosecutor's manner of final argument.[6]

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[37] 386 Mass. at 151, 434 N.E.2d at 1238.

§ 12.4. [1] 387 Mass. 25, 438 N.E.2d 820 (1982).

[2] *Id.* at 25, 438 N.E.2d at 821-22.

[3] *Id.* at 26-27, 438 N.E.2d at 822.

[4] *Id.* at 28, 438 N.E.2d at 822.

[5] *Id.*

[6] *Id.* at 29, 438 N.E.2d at 823.

The defendant was convicted of the charges against him. He then appealed, asserting that the prosecutor committed reversible error when he bound his hand with the length of rawhide, not in evidence, as a dramatic prop during closing argument to the jury.[7] The Supreme Judicial Court agreed and reversed the convictions, finding the prosecutor's conduct to be "clearly improper."[8]

The response of the Court to the action of the prosecutor was direct and absolute. "The prosecutor's display of rawhide," Chief Justice Hennessey stated, "was clearly improper. Closing argument must be confined to the evidence and the fair inferences from the evidence."[9] Absolutism aside, however, the problem for trial counsel is to determine what "displays" are truly improper because they are not evidentiary or properly inferred from evidence or testimony. In other words, at what point do the "props" used by counsel cease to be instructive to the jury or the court, and instead threaten the reasoned process by which the finder of fact must come to a decision.

In *Hoppin*, the trial judge, following an objection of defense counsel, attempted to remedy the effect of the use of the leather prop by curative instructions. Specifically, the judge told the jury to disregard what the prosecutor had in his hand because it was not a "matter" which was in evidence and therefore was beyond the limits of what counsel could present to the jury.[10] It is questionable to what degree such curative instructions are ever effective upon the minds of jurors, particularly when an attorney has used a method of persuasion more dramatic, and more impressive than the means used to counter the effort. On the other hand, our system of advocacy embraces the notion that many forms of visual and oratorical persuasion are either appropriate to the courtroom or, if not entirely appropriate, difficult to regulate within the context of the traditional adversary system.

In this regard the Code of Professional Responsibility is not a particularly helpful guide. Lawyers before a tribunal are cautioned not to state or allude to a matter that will not be supported by admissible evidence.[11]

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[7] *Id.* at 25-26, 438 N.E.2d at 822.

[8] *Id.* at 30, 438 N.E.2d at 823.

[9] *Id.*

[10] *Id.* at 29 n.5, 438 N.E.2d at 823 n.5. Specifically, the judge cautioned the jury that:

> Briefly, it was brought to my attention that the prosecution in this case, during the course of a portion of his argument, had with him in his hands a rope of some kind, visibly, apparently made out of leather. Now, that was not in evidence, and I instruct you to disregard the fact that he had it in his hand. It would not be proper for you not to do so. . . . [H]e may not bring before you matters which are not in evidence, and that was inappropriate and it . . . should be disregarded by you, . . . because you must decide the case based solely on the evidence that you have heard.

Id.

[11] SUP. JUD. CT. R. 3:07 DR 7-106(C)(1).

Similarly, both the Standards for the Prosecution and the Defense Functions provide that it is improper for either side to introduce, at any time during the trial, facts not properly admitted which might cause the jury to be misled as to the inferences or conclusions which it might draw.[12] Unfortunately, the questions concerning the introduction of dramatic props at a trial are difficult to cover completely in a flat prohibition against the introduction of "facts" or "evidence" not *properly* admitted. First of all, it is unclear what the Code includes within the ambit of facts and evidence. On the one hand, the notion simply could encompass those technical distinctions between admitted or excluded facts and testimony; on the other hand, there could be a broader concern with the use of subterfuge generally as a part of the accepted trial tactics.

Subterfuge in the context of trial tactics runs the gamut from surprise and trickery to props of one form or another and to communications to the trier of fact by other than proper means.[13] For example, our adversary system both invites and condemns the use of forms of dress as a means of communication to the jury. Yet, it seems clear that every trial lawyer has suggested to a client how to dress to his or her advantage in the courtroom. Similarly, we are reluctant to approve the use of props or dramatic tactics to obtain an advantage over a particular witness or before the trier of fact. Nevertheless, the profession is more than familiar with tactics such as trying to provoke or coerce witness testimony through the use of spurious documents or props. In response to the ambiguous signals which our trial system gives to its advocates, as Judge Keeton has stated:

> The duty of supporting the client's cause is sometimes so forcefully stated as to support the argument that as a trial lawyer you are obliged to assert every legal claim or defense available, except those you reject on tactical grounds relating to the immediate case. But the aim of the trial system to achieve justice, the interests of future clients, and your legitimate interest in your own reputation and future effectiveness at the bar compel moderation of that extreme view.[14]

The trial lawyer is thus left to find the line beyond which trial tactics, and in the *Hoppin* instance, final argument, may not go in terms of introducing evidence extraneous to the proceedings. Certainly, the jury in *Hoppin* had heard of the leather thong from the victim. The jury would have had such an image in its collective mind even if it had not actually been produced. No amount of cross-examination on the part of the defense could remove such an image if the jurors chose to recall it. Never-

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[12] STANDARDS RELATING TO THE PROSECUTION FUNCTION §§ 3-5.6, 3-5.9 (ABA 1980); STANDARDS RELATING TO THE DEFENSE FUNCTION §§ 4-5.6, 4-5.9 (ABA 1980); *see also* SUP. JUD. CT. R. 3:08 PF 13 and 14, DF 14 and 15.

[13] *See* R. KEETON, TRIAL TACTICS AND METHODS 4-5, 104-05, 326-27 (1973); Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577, 578-93 (1975).

[14] R. KEETON, *supra* note 13, at 4-5.

theless, the Court found it necessary to restrict the allusion to the leather in the final argument.

The Court viewed the prosecutor's prop in *Hoppin* as one which incites the emotions of the jury.[15] The image, according to the Court, is one of sexual violence totally uncorroborated except for the testimony of the victim.[16] But as noted previously, the unsubstantiated use of the leather strap to bind the victim would be available to the prosecutor as an image in final argument in any event because of the victim's prior testimony. The Court is therefore not restricting the discussion of the image but rather the physical manifestation of the appropriate image. Unfortunately, the restriction is more easily applied than explained. In the same case, buried in a footnote, is a reference to the fact that the same prosecutor, at another point in final argument, "displayed a small pillow, which he explained to the jury, was used by his daughter to hide teeth for the tooth fairy. The prosecutor used the pillow to dramatize his analogy of the defendant's theory of the case to a fairy tale."[17] No reference was made by the Court to this act of the prosecutor as one which would also stir up the emotion of the jury. Yet such a dramatic act certainly contained a prop which, although not oriented toward sex and violence, nevertheless was designed to have a graphic impact upon the jurors.

Rather than speculate concerning the reason for the Court treating one prop as violative of the Code of Professional Responsibility and another acceptable adversary procedure during final argument, it is perhaps best to conclude that the problem is inherently subjective. Our system encourages drama, innovation and to a certain extent, props in the process of advocacy. To conclude one prop prejudicial and another appropriate suggests that the Supreme Judicial Court should compile a catalogue of appropriate dramatic procedures for trial advocacy. In most instances, the trial judge would appear to be in the best position to draw conclusions concerning such propriety. Otherwise the spector of rigid form of practice and procedure looms all too real for the trial bar.

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[15] 387 Mass. at 30, 438 N.E.2d at 824.

[16] *Id.* at 31, 438 N.E.2d at 824.

[17] *Id.* at 29 n.3, 438 N.E.2d at 822-23 n.3.